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HOCK PENG REALTY SDN BHD v. TING SIE CHUNG

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL SUIT NO: KCH-22-53-2009]
13 JUNE 2016

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TORT: *Defamation – Absolute privilege – Land developer and landowner entered into agreement to develop land – Payment advanced by land developer to discharge charge on land but landowner defaulted in repayment – Land developer lodged caveats against several units of houses that landowner was entitled to – Caveats*
C *removed and landowner ordered to pay damages for wrongful lodgement – Parties entered into consent order that assessment of damages should proceed but payment of amount assessed should be stayed – Landowner obtained prohibitory order against parcels of lands – Whether prohibitory order obtained in good faith – Whether issuance of prohibitory order gave rise to twin actions of defamation and abuse of*
D *court process*

The plaintiff, a developer, entered into an agreement to develop the defendant's land. Under the agreement, the defendant was entitled to 26 units of houses developed on the land. According to the plaintiff, payment was advanced to the defendant in order for him to discharge the charge on the
E land with the bank but the latter defaulted in repayment of the said advance. The default led the plaintiff to lodge caveats against the said 26 units of houses. The defendant applied to remove the said caveats at the High Court and was successful in his application. The plaintiff was ordered to pay damages for the wrongful lodgement of the same. A consent order recorded
F that the assessment of damages should proceed but payment of the amount assessed should be stayed till the disposal of the appeal. Six years later, the defendant obtained a writ of seizure and sale and a prohibitory order against seven parcels of the plaintiff's land. The plaintiff applied to remove the caveats lodged against the seven parcels of land and was successful. The
G plaintiff further filed a suit ('Kuching HC suit') against the defendant in relation to the prohibitory order as it was alleged that it was obtained with malice and bad faith. The suit was struck out by the court. Simultaneously, the plaintiff filed the present suit on the same grounds as the Kuching HC suit and to include the tort of abuse of court process as its other cause of action. The issue that arose for the court's determination was whether the
H application by the defendant and the subsequent issuance of the prohibitory order on the plaintiff's seven parcels of land gave rise to the twin actions of defamation and abuse of court process.

Held (ordering accordingly):

I **(1)** The prohibitory order was made after the application for a writ of seizure and sale was approved by the court which followed the award of damages and which, in the context of this case, was the pleading.

Since the registration with the Land Office was mandated by law for without it, *ie* the registration, the prohibitory order would be totally useless and will not have the legal effect for which it was intended, it did not come within the meaning of publication in the law of defamation. Therefore, the cause of action founded in defamation failed as the prohibitory order was not published and even if it was, it was completely excused by the defence of absolute privilege. (para 13)

(2) The defence of absolute privilege did not clothe the defendant with immunity from the tort of abuse of court process. The defendant committed abuse of court process because when he applied for the prohibitory order, the consent order to stay the payment of the damages was still in place and therefore, he knew very well when the order was obtained that the plaintiff failed to satisfy the damages as expressly stated in the prohibitory order. The defendant was aware that with the consent order, he had no legal basis to obtain the prohibitory order. Clearly, the process of the court had been misused. (paras 18, 20 & 21)

Case(s) referred to:

Abdullah Mohd Noor v. Syarikat Pembangunan Setia Jaya (Civil Suit No. 22-98-2011) (Unreported) ***(foll)***

Crawford Adjusters (Layman) Ltd v. Sagicor General Insurance (Layman) Ltd [2014] 1 AC 366 ***(refd)***

Goldsmith v. Sperrings Ltd [1977] 1 WLR 478 ***(refd)***

JSC BTA Bank v. Ablyazor (No. 6) [2011] 1 WLR 2996 ***(refd)***

Lincoln v. Daniels [1961] 3 All ER 740 ***(refd)***

Marrinan v. Vibart & Anor [1962] 3 All ER 380 ***(refd)***

Pell Frishmann Consultants Ltd & Another v. Prabhu & Others [2013] EWHC 2203 ***(refd)***

Roy v. Prior [1970] 2 All ER 729 ***(refd)***

Taylor & Ors v. Director of the Serious Fraud Office [1999] 2 AC 177 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 166A

Rules of Court 2012, O. 47 r. 6(d), (g)

Rules of the High Court 1980, O. 47 r. 6(2), (8)

For the plaintiff - Lim Heng Choo, Sim Hui Chuang, Alex Lim & Steven Sia; M/s Lim & Lim Advocates

For the defendant - Chong Siew Chiang, Henry Ling & Carol Lua; M/s Chong Brothers Advocates

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang J:

[1] The plaintiff is a well-known property developer in Sarawak with both housing and commercial projects in most of its major towns. Its Managing Director, Datuk Toh Chiew Hock was in fact named Sarawak State Entrepreneur for 2007. The defendant is an advocate who practiced in the

A firm of Messrs Ting & Ting Advocates. Way back in 1989, the plaintiff and the defendant entered into an agreement to develop the defendant's land in Bintulu described as Lot 16 Kemena Land District ("the development agreement"). Under the development agreement the defendant as the landowner was entitled to 26 units of houses developed on it. The plaintiff
B contended that a sum of RM250,000 was advanced to the defendant in order for him to discharge the charge on the land with Kong Ming Bank but the defendant defaulted in repayment of the said advance. The default led the plaintiff to lodge caveats against the said 26 units of houses and was the starting point of a legal wrangle between the parties which spawned a number
C of court actions, not just here in Kuching but in Sibu and Bintulu as well and this writ action is one of the two of them which came before me. Since these actions are relevant to my judgment on the plaintiff's claim herein of defamation and abuse of the court process against the defendant, I would have to make a specific mention of these other, and earlier actions first. Given these multiple actions I would from now on refer to the parties by
D their names which I have taken the liberty to shorten ie Hock Peng and Mr Ting, respectively.

Litigation History

(i) Bintulu OS No. 24-47-2000

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[2] Mr Ting fired the first salvo by filing an originating summons to remove the said caveats on the 26 units of houses ie OS No. 24-47-2000. Those caveats were removed upon a successful application by Mr Ting before Dato' Sulaiman bin Daud JC (as His Lordship then was) on 29 January 2001 and Hock Peng was ordered to pay damages for the
F wrongful lodgement of the same. Hock Peng filed an appeal against the said order and also filed a summons in chambers dated 19 March 2001 for stay of that order. That application also came before Dato' Sulaiman Daud JC who on 28 March 2001 recorded a consent judgment as follows:

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> By Consent It Is Hereby Ordered that the assessment of damages should proceed but **payment of the amount assessed shall be stayed till the disposal of the appeal**. Parties to exchange documents relied for assessment of damages in their possession or custody at least two weeks before the assessment. Each party to bear their own cost. (emphasis added)

H **[3]** Premised on the consent order, the assessment proceeded before the Deputy Registrar for a number of days and on 30 January 2007, he assessed damages for Mr Ting at RM1,789,938.50 with interest and cost. On 20 April 2012, Hock Peng appealed to the judge in chambers who on 3 March 2009 set aside the damages but which decision was overturned on appeal by the
I Court of Appeal, thus restoring the Senior Assistant Registrar's order on damages. Hock Peng's notice of motion for leave to appeal to the Federal Court was dismissed on 2 July 2013.

(ii) Bintulu Application For Execution No. 36-01-2007

[4] On 16 May 2007, about six years after the consent order Mr Ting applied by way of an *ex parte* application and obtained a writ of seizure and sale and a prohibitory order against seven parcels of Hock Peng's land in Sibu. The said order, I would reproduce below but without the schedule listing the seven parcels of land. It reads as follows:

> Whereas you the said Hock Peng Realty Sendirian Berhad, the above-named defendant/judgment debtor **has failed to satisfy an Order given on 30th day of January 2007 and dated the 28th day of February 2007** in favour of Ting Sieh Chung, the plaintiff/judgment creditor, for **the sum of RM1,842,073.91 (as at 15th May 2007)** together with the interest at the rate of 8% per annum from the 30th January 2007 until the full settlement and costs which shall be paid by the defendant/judgment debtor to the Advocates for the plaintiff/judgment creditor.
>
> It is ordered that you the said Hock Peng Realty Sendirian Berhad be and you are hereby, for a period commencing from of the date of registration of this Order under the provisions expiry of six (6) months from the date of this Order, prohibited and restrained of this Order, prohibited and restrained from transferring, charging or leasing the properties specified in the Schedule hereunder or creating any *lien* or equitable charge thereof by deposit of any instrument of tide. (emphasis added)

This prohibitory order was extended twice by the court, for six months each time, ie on 5 October 2007 and 6 October 2008 respectively. Both orders were also obtained *ex parte*. Then following an application by Hock Peng in this same action, the learned Senior Assistant Registrar on 20 January 2009 ordered the writ of seizure and sale and the prohibitory order as well as the two orders extending the same to be set aside with cost to Hock Peng.

(iii) Sibu OS No. 24-15-2009

[5] Hock Peng applied in this action to remove the caveats lodged by Mr Ting against their seven parcels of land which lands I have mentioned earlier. Mr Ting also filed an application in this same action for the caveats to remain pending the disposal by the Court of Appeal of Hock Peng's appeal in action no (i) above. I heard both the originating summons and the defendant's application for which I wrote a joint ruling where I ordered, on 13 July 2009, the caveats to be removed and for damages to be assessed. The assessment of damages proceeded as ordered and the Deputy Registrar assessed the same at RM20,834,400 with interest and cost. However, on appeal to judge in chambers, the damages was reduced by Lee Heng Chiong J to RM14,766,900 and likewise the cost – from RM500,000 to RM100,000 as well as the interest – from 6% per annum to 5% per annum. That decision made on 28 April 2015 was appealed to the Court of Appeal by Hock Peng. On 24 February 2016 the Court of Appeal allowed Mr Ting's appeal and ordered rehearing of the assessment of damages before another Senior Assistant Registrar.

(iv) Kuching Suit No. 22-51-2009

[6] Hock Peng filed this suit against Mr Ting was premised on the prohibitory order against its seven parcels of land in the Bintulu originating summons (case no (i) above) which it alleged was obtained with malice and bad faith because the order was obtained in direct contravention of the said consent order dated 28 March 2001. Special damages in the sum of RM34,100,000 as well as general, aggravated and exemplary damages were also pleaded against him. This suit was struck out by Linton Albert J (as His Lordship then was) on 11 February 2010. Hock Peng appealed to the Court of Appeal and the appeal was dismissed on 26 September 2012. Hock Peng's application for leave to appeal to the Federal Court was also dismissed on 24 October 2012.

Finally, the present action but before going into the merits of the case, I just wish to make clear that the details of some of the pertinent orders and their dates mentioned by me in the above cases were obtained from the case/ appeal records kept in the court's computerisation system.

(v) Suit No. 22-53-2009

[7] As can be seen from the case registration number, this action was filed almost simultaneously with the suit no (iv) above. Both the statements of claim are dated 30 March 2009. It is also premised on the prohibitory order being wrongfully obtained by Mr Ting on the same ground as the contravention of the consent order but its cause of action is based on defamation which was "actuated by malice or desire to cause serious financial damage" to Hock Peng (see para. 13 of the amended statement of claim) and was made with "*mala fide* intention" (see para. 16 of the same). That was the original pleading. Hock Peng applied to include the tort of abuse of process as its other cause of action which application I dismissed on 19 February 2013 but which decision was reversed on appeal by the Court of Appeal on 20 June 2014. Further application for leave to appeal to the Federal Court by Mr Ting was also dismissed on 21 May 2015. Thus, the trial proceeded before me with Hock Peng calling Datuk Toh Chiew Hock as its sole witness. As for Mr Ting, other than himself, Mr Tam Kok Meng, a chartered accountant gave evidence for him. Based on the amended statement of claim, I reiterate that the two causes of action for my determination are that of defamation and abuse of court process.

The Defence

[8] Mr Ting pleaded that the consent order does not restrain him from obtaining the prohibitory order and that the same was not actuated by malice and was published on an occasion of 'absolute privilege' or alternatively that of 'qualified privilege'. The order was not an abuse of the court process because it was based on the award of damages and it was to prevent Hock Peng from disposing of the said lands before the full satisfaction of the award

on damages which together with interest amounts to RM2,790,062.38 as at 28 January 2014. The prohibitory order, he pleaded further was not obtained to extort money from Hock Peng. It is Hock Peng who abused the court process by filing this action, pleaded Mr Ting when it could have filed its claim in the same action where the writ of seizure and sale and prohibitory order was obtained. In respect of the cause of action for abuse of the court process he pleaded that it is barred by *res judicata* and/or estoppel because that was Hock Peng's cause of action in the Kuching Suit No. 22-51-2009-III which dismissal has been affirmed by the Court of Appeal and leave to appeal to the Federal Court has been dismissed. Of course with the order of the Court of Appeal allowing the amendment, this is no longer a viable defence.

[9] Mr Ting finally pleaded that the award of damages in favour of Hock Peng in the sum of RM14,778,400 following the removal of the caveat in Sibu OS No. 24-15-2009 was in respect of the same seven parcels of land owned by it. Being so the filing of this action is also an abuse of the court process.

Reply To The Defence

[10] Hock Peng, *inter alia* reiterated its stand that the prohibitory order was unlawfully obtained without any legal basis in view of the consent order and that in this action it was not claiming for loss of sale of its commercial properties on seven parcels of land in Sibu but for damages for defamation and abuse of court process. The non-claiming of the loss of commercial properties is reiterated in the opening speech of one of Hock Peng's counsel, Mr Lim Heng Choo (other than Mr Lim Heng Choo it was represented by Mr George Lim, Mr Sim Hui Chiang, Mr Lim Lip Sze and Mr Alvin Wong) which have been marked as exh. P1. Mr Ting, according to the pleading further, being a lawyer and valuer would have full knowledge that one of that seven parcels of land would be sufficient to satisfy the judgment debt of RM1,842,073.91 and there was no necessity to seize all seven parcels of land with the prohibitory order.

Issue For Determination

[11] I am of the view, after considering the pleadings and the evidence adduced at the trial that there is just one issue which I have to resolve and in determining it, I consider myself fortunate that the material facts governing the same are undisputed – based on the litigation history and the cause papers filed in the previous court actions which I have outlined above. In fact I would be so bold to state that it just boils down to this – does the application by Mr Ting and the subsequent issuance of the prohibitory order on Hock Peng's seven parcels of land give rise to the twin actions of defamation and abuse of court process?

A **Defamation**

[12] Absolute privilege is a complete defence to the tort of defamation, whether libel or slander and here it is that of libel that Hock Peng has found its action on. It is an essential requirement in the law of defamation that the aggrieved person must prove that the libellous statement was published. B There is, submitted Mr Chong Siew Chiang (one of two counsels for Mr Ting, the other being Mr Henry Ling) absolute privilege in legal proceedings, citing *Lincoln v. Daniels* [1961] 3 All ER 740 where the court defined three categories of absolute privilege. The first is anything said in the course of proceedings by the judges, the parties, counsels and their witnesses C and includes the contents of documentary evidence. The second is everything done from the inception of the proceedings and extends to all pleadings and others documents ie the cause papers and the third is "evidence which a witness gave coram justice taken by a solicitor". I am of course concerned with the second category here. Additionally, Mr Chong Siew Chiang D submitted that the lodgement of the prohibitory order with the Sibu Land Office does not come within the meaning of publication because that lodgement was a legal requirement under O. 47 r. 6(d) and (g) of the Rules of Court 2012 (the equivalent requirements in the Rules of the High Court 1980 were O. 47 r. 6(2) and (8)). In this regard it is not disputed that upon payment of a prescribed search fee, an applicant can have access to the record E in respect of the land kept by the Land Office Registry and that the prohibitory order once registered with the Land Office would appear on its land title. PW1 in his evidence given on 29 January 2016 (at pp. 35 to 36 of the notes of proceedings) said even two days prior to his testimony when such a search was made at the Land Office, the lodgement of the prohibitory F order was still reflected in the land titles. That search was not tendered as evidence but a print out of the seven land titles at pp. 1 to 20 of the plaintiff's supplementary bundle of documents (exh. P2 (A)) from a search made on 26 June 2012 (the date is shown at the top right head corner of the print out against the words "Data as at: ...") still show the issuance of the prohibitory G order, its registration and extension dates. I have not been shown any evidence to contradict his evidence that the prohibitory orders would still be reflected in the land titles since they were still so in 2012, despite being set aside a few years before that in 2009.

[13] In the joint reply submission of Hock Peng's five counsels, it was H submitted that the prohibitory order is not a pleading and neither does it come within the meaning of "other documents brought into existence for the purpose of the proceedings" ie the second category in *Lincoln*'s case (*supra*). With respect I am unable to agree with them. Although the prohibitory order is obviously not a pleading nor an affidavit but the order would still in my I view fall within the meaning of "other documents ..." stated in the category. This is because the order was made after the application for a writ of seizure

and sale has been approved by the court which followed the award of damages in the originating summons and which in the context of this case is the pleading. Since the registration with the Land Office of Sibu is mandated by law for without it, ie the registration, the prohibitory order would be totally useless and will not have the legal effect for which it was intended, I am further of the view that it does not come within the meaning of publication in the law of defamation. Thus, on these grounds the cause of action founded on defamation fails for the prohibitory order was not published and even if it were, it is completely excused by the defence of absolute privilege. In saying this am being consistent with the view I held in *Abdullah Mohd Noor v. Syarikat Pembangunan Setia Jaya* (Civil Suit No. 22-98-2011) where I held that the prohibitory orders obtained against the plaintiff's landed properties by the defendant came within the second category of absolute privilege in *Lincolns*'s case. That decision of mine was appealed to the Court of Appeal which appeal was dismissed on 12 August 2014 and on 15 January 2016 the defendant's application for leave to appeal to the Federal Court was also dismissed.

Abuse Of Court's Process

[14] Mr Chong Siew Chiang submitted that the same defence of absolute privilege is available to his client for the cause of action based on abuse of court's process. In support of his contention he cited the case of *Marrinan v. Vibart & Anor* [1962] 3 All ER 380 where the headnote at p. 380 reads as follows:

> The immunity of a witness from liability in respect of anything said or done in the course of judicial proceedings (which covers disciplinary proceedings before the Benchers of an Inn of Court) and the preparation of the evidence which is to be given in those proceedings, is an immunity from actions of any sort (including an action based on alleged conspiracy to injure the plaintiff), and not merely from actions for defamation (see, particularly page 383, letter B and page 385, letter C, post).

[15] This case of course concerns the first category of absolute privilege in *Lincoln*'s case (*supra*). It is interesting to read and I think I should reproduce what was said by Diplock LJ at p. 385 when His Lordship commented on the submission of the plaintiff's counsel in that case which has a direct bearing with this one before me:

> Counsel for the plaintiff has sought to persuade this court that that rule of public policy, for reasons which it is impossible to explain, applies only to actions for defamation and that, if one is sufficiently ingenious to discover some other way of bringing an action against a witness for evidence which he has given in a court, then public policy does not apply to that, although all the evils of the action are precisely the same as if it were a direct action for defamation. It seems to me quite plain on the authorities – and on the English authorities as well as the Australian authority directly in point – that that argument is without foundation.

A An attempt very similar to that in this case was made in 1856, in *Revis v. Smith*. There, instead of bringing an action for defamation, an attempt was made to bring a special action on the case, analogous to malicious prosecution. As Crompton, J., said in *Henderson v. Broomhead*: "That seems to have been done in despair" words which, in my view, are appropriate to this attempt in 1962. Yet another attempt was made quite recently, in B *Hargreaves v. Bretherton*, where an action was brought claiming damages against the defendants for "falsely and maliciously and without just occasion or excuse [committing] perjury in relation to the facts of the case".

[16] On the other hand, Mr Lim Heng Choo in his main submission drew C my attention to the House of Lord's case of *Roy v. Prior* [1970] 2 All ER 729 that the immunity conferred on evidence given in court cannot apply to a bench warrant which was given *ex parte*. Public interest, held Lord Wilberforce in the cited case requires that such a warrant be given carefully, responsibly and impartially. In Hock Peng's counsel's joint reply D submission, a later House of Lord's case, *Taylor & Ors v. Director of the Serious Fraud Office* [1999] 2 AC 177 was referred to where Lord Hoffman said that immunity in respect of statement made in court "does not apply to actions for malicious prosecution where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in E motion against the plaintiff. It does not matter that an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court" see *Roy v. Prior* [1971] AC 470."

[17] I had just now mentioned my previous decision in *Abdullah*'s case (*supra*) and what I said was just half of the decision. The other half was finding F the defendant in that case liable for abusing the court process when it sealed an order stating that the judgment sum entered against a company, Sarahon Construction Sdn Bhd (of which the plaintiff was the Chairman and one of its directors) "shall be paid by the officers and/or directors ..." when no such term was pronounced by the learned Senior Assistant Registrar. That sealed G order was the basis upon which a prohibitory order was obtained against the plaintiff's two parcels of land. Pursuant to that finding, I awarded Abdullah RM350,000 as damages for abuse of the court's process.

[18] I am emboldened by the affirmation of my decision in *Abdullah*'s case (*supra*) by the appellate courts to say that Mr Lim Heng Choo's citation of H the House of Lord's decision in *Roy*'s case (*supra*) is not misplaced and that the defence of absolute privilege does not clothe Mr Ting with immunity from the tort of abuse of court process. And abuse the court process he did because when he applied for the prohibitory order, the consent order to stay the payment of the damages was still in place and therefore he knew very I well when the order was obtained that Hock Peng did not "failed to satisfy" the damages of RM1,842,073.91 as expressly stated in the prohibitory order. The fact that the appeal against the assessment of damages took a

considerable time to be heard in the Court of Appeal and even though Mr Ting said in his evidence at Q&A ten of his witness statements that he relied on the advice of his then counsel, Mr Tai Choi Yu to obtain the prohibitory order in the honest belief that it was the best security to ensure full recovery of the judgment debt, these reasons are not good justification to commence the execution proceeding and obtaining the prohibitory order. Neither is it material to the defence of this cause of action that Mr Ting has no intention (as he said in his evidence) to proceed with the next step in the execution proceeding which is to apply for directions to sell the seven parcels of land. The words "failed to satisfy" in the judgment sum in the said orders connote that a demand for the said sum was made but was not acceded to. It is not disputed that no such demand was ever made. Mr Henry Ling, Mr Ting's other counsel in his submission in reply referred to a recent Privy Council's case of *Crawford Adjusters (Layman) Ltd v. Sagicor General Insurance (Layman) Ltd* [2014] 1 AC 366 and the judgment of Lord Wilson JSC which he submitted have overruled what Bridge LJ held in *Goldsmith v. Sperrings Ltd* [1977] 1 WLR 478 where His Lordship said that the court process is not abused "when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance" and doubted if it is abuse of court process if the claimant's action had two purposes, one legitimate and the other improper. The existence of this twin purposes were taken further by Teare J in *JSC BTA Bank v. Ablyazor (No. 6)* [2011] 1 WLR 2996 who held that any legitimate purpose negatived the abuse even if the improper one was predominant. It is this very point that Lord Wilson JSC appears not to agree with at p. 393 of the report. And at p. 394 His Lordship also appears (I again used the word 'appears' because the intention was not expressly stated as so) to disagree with the requirement held in decisions in the United States and in Australia that to constitute abuse of court process there must be in the words of *Fleming's The Law of Torts* 10th edn. at para. 27.100 "some over right act or threat, distinct from the proceedings themselves, in furtherance of that purpose, such as in the *Grainger* case the extortion accompanying the capias". Thus, my reading of the case cited does not move me to agree with the point which Mr Henry Ling was trying to make in his written submission.

[19] Mr Henry Ling's diligence also produce another relatively recent English case of *Pell Frishmann Consultants Ltd & another v. Prabhu & others* [2013] EWHC 2203 where Penelope Reed QC (sitting as a deputy judge of the Chancery Division) summarised the principles on striking out a claim for abuse of process (indirectly relevant to a claim for one) as follows:

> a. It is clear that, if a party has a genuine grievance for which he is entitled to see redress, the use of all remedies available to him by the law cannot be an abuse of process: *Goldsmith v. Sperrings Ltd* [1977] 1 WLR 478.

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b. Motive and intention are irrelevant except where malice is in issue. The fact that a party who asserted a legal right was activated by feelings of personal animosity, vindictiveness or general antagonism was irrelevant: *Broxton v. McClelland* [1995] EMLR 485.

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c. An action was only an abuse if the court's processes were being misused to obtain something not properly available to the claimant in the course of properly conducted proceedings either by achieving a collateral purpose beyond the proper scope of the proceedings themselves or the conduct of the proceedings so as to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those normally encountered in the course of

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properly conducted litigation: the *Broxton* case.

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d. A purpose will not be regarded as illegitimate if it is no more than the natural consequence of the action succeeding and if the claim is commenced with a legitimate and an illegitimate purpose the fact that there one purpose is legitimate justifies the claim continuing: *JSC BTA Bank v. Ablyazov (No. 6)* [2011] 1 WLR 2996.

e. Only in the clearest and most obvious case will the court strike out the claim as an abuse: the *Broxton* case.

[20] Whilst I am enlightened by all these legal literature on this cause of action and am aware that Mr Ting did nothing more than apply for the

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prohibitory order and did not pursue that execution proceeding to its logical conclusion, which was auctioning the seven parcels of land for sale, the fact remains that he knew that with the consent order he had no legal basis to obtain the prohibitory order.

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[21] To exacerbate the matter further, the prohibitory order was never served on Hock Peng nor their counsel whose identity was known to Mr Ting since Hock Peng was represented by one at the assessment hearing before the learned Senior Assistant Registrar. Datuk Toh Chiew Hock testified in cross-examination that he only found out the prohibitory order when he went to land and survey department to apply for development of the seven parcels

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of land. Clearly the process of the court has been misused as I had reasoned above and which I now repeat.

Damages

[22] Mr Ting has called a chartered accountant Mr Tam Kok Meng whose

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evidence primarily was to point out that Hock Peng's financial statements for the financial year of 2007 to 2010 were not in compliance with MASB.32 which is the accounting standard applicable to property developer. He explained that MASB stands for Malaysian Accounting Standards Board which is the statutory body set up *via* Financial Reporting Act 1997 and is

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solely responsible for setting accounting standards for preparation of financial statements which are required to be prepared or lodged under any law administered by the Securities Commission, the Central Bank or the Registrar of Companies.

[23] Section 166A of the Companies Act 1965 specially provides that "approved accounting standards" as referred in the Companies Act 1965 shall refer to standards approved by MASB as provided in the Financial Reporting Act 1997.

[24] From his analysis of the said financial statements (at pp. 18 to 38, 40 to 60, 106 to 126 and 131 to 158, respectively of exh. P2) there should not be a pre-tax profit and net profit for Lot 976 and since Lot 3585 were not included in the four years statements, he had no comment on it (see Q&A 40 of DW2's witness statement). These lots are two out of the seven parcels of land of Hock Peng in action no (ii) above and which are the subject matter of this action.

[25] With respect I see no relevance of this witness evidence to the damages prayed for because, firstly the financial standing and reputation of Hock Peng is only a factor for consideration if I had allowed its claim for defamation. Secondly, as stated earlier, Hock Peng is not claiming any loss from the sales of the commercial properties on the seven parcels of lands and thirdly, in relation to the damages for the tort of abuse of process, I am of the view that these statements would not assist me in determining the amount of damages which should be paid for abusing the court process.

[26] In considering the appropriate amount of damages I must factor in the fact that Hock Peng's allegation made in its amended statement of claim and put to Mr Ting in cross-examination that the prohibitory order was obtained in order to extort Hock Peng was unsubstantiated. Why I say so is because as stated earlier the prohibitory order was never served on Hock Peng nor its counsel. In order for extortion to arise, the threat must be brought home to the intended victim, in this case Hock Peng. When it was never served with the prohibitory order in the first place, where was the threat?

[27] Another factor relevant for my consideration as well is the fact that Hock Peng has been awarded damages for the wrongful lodgement of the caveats against the same seven parcels of land and I must bear in mind that when the caveats were lodged on 23 September 2008 the prohibitory order was still subsisting for they were only set aside on 20 January 2009. The caveats were removed about eight months later ie on 3 September 2009. I am fully aware that that wrongful lodgement was a separate and distinct cause of action but given that the caveats were lodged on the same lands and based on the same facts or to put in another way it could be traced back to the litigation history as outlined earlier, there would in my view, be some overlapping of the damages obtained by Hock Peng in the Sibu case with the one it is entitled to here, regardless of the fact that such damages is being re-assessed. Yet another important consideration governing my assessment of the damages is the fact that the prohibitory order was obtained about six years after the consent order lending credence to Mr Ting's contention that this order was applied for to preserve his right to be paid the damages for

A the wrongful lodgement of the caveats against his land by Hock Peng. Although there is simply no legal justification for it given the consent judgment but the absence of malice have a bearing on the damages to be awarded.

B **[28]** In *Abdullah*'s case (*supra*), I had ordered RM350,000 as damages for abusing the court process. Based on the considerations above and using *Abdullah*'s case (*supra*) as a guideline (which I think that I am entitled to since the decision has gone through the rigours of the appeal process), I would award Hock Peng damages in the sum of RM50,000 – not the RM20 million prayed by it. I further order interest at 5% per annum with effect today until
C full and final settlement thereof. As for cost, since this action is premised on two causes of action but Hock Peng only succeeded in one and also failed to prove their allegation on extortion, I would not order cost against the defendant. In other words, each party is to bear their own costs.

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